Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1993

MEN-GUER CHRYSLER PLYMOUTH, INC.,

Petitioner,

-v-

CHRYSLER CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT C. PAXTON, II
Counsel of Record
PATRICIA A. JAMISON
Attorneys for Petitioner
88 East Broad Street
Suite 1590
Columbus, Ohio 43215
(614) 221-3006

5197
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

Whether the Sixth Circuit erred in ruling the District Court's application of Ohio's 1980 "Dealers Act", a law similar to laws now in effect in 48 states, to a 1964 Chrysler franchise agreement was an unconstitutional, retroactive application of a substantive law.

Whether the Sixth Circuit erred in ruling the District Court's application of Ohio's 1980 "Dealers Act" to rights acquired by Chrysler in a 1986 Settlement Agreement was an impermissible, retroactive application.

PARTIES TO THE ACTION

The parties named in the caption are the only parties to this action.

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No.

In The

Supreme Court of the United States

October Term, 1993

MEN-GUER CHRYSLER PLYMOUTH, INC.,

Petitioner,

vs.

CHRYSLER CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner hereby requests that this Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit entered on January 12, 1994, and the Denial of a Petition for Rehearing entered February 11, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, which is unreported, and is reprinted as Appendix B, pp. 2a-14a of this petition.

The opinion of the United States Court of Appeals for the Sixth Circuit, denying a Petition for Rehearing, is reprinted as Appendix A, p. 1a.

The Memorandum and Order of the United States District Court for the Northern District of Ohio is reprinted as Appendix C, 15a-29a of this petition.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit was entered in this action on January 12, 1994, and the denial of the Petition for Rehearing was entered on February 11, 1994.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(A).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The statutes involved in this petition are Ohio Revised Code §§ 4517.50, 4517.54 and Ohio Constitution, § 28.

Ohio Revised Code:

> **Section 4517.50. Notice of proposed additional new motor vehicle dealer or of relocation; protests.**
>
> (A) Except as provided in division (D) of this section, when a franchisor seeks to enter into a franchise to establish an additional new motor vehicle dealer in, or relocate an existing new motor vehicle dealer at a location in, a relevant

market area where the same line-make of motor vehicle is then represented, the franchisor shall first give notice in writing, by certified mail, to the Motor Vehicle Dealers Board and to each franchisee of such line-make in the relevant market area of the franchisor's intention to establish an additional new motor vehicle dealer in, or relocate an existing new motor vehicle dealer at a location in, that relevant market area. Each notice shall set forth the specific grounds for the proposed establishment of an additional motor vehicle dealer or relocation of an existing motor vehicle dealer. Within fifteen days after receiving the notice, or within fifteen days after the conclusion of any appeal procedure provided by the franchisor, whichever is later, the franchisee of the same line-make may file with the board a protest against the establishment or relocation of the proposed new motor vehicle dealer. When such a protest has been filed, the board shall inform the franchisor that a timely protest has been filed and that a hearing is required pursuant to section 4517.57 of the Revised Code. When more than one protest is filed against the establishment or relocation of the same dealer, the board may consolidate the hearings to expedite disposition of the issue.

(B) No franchisor shall establish an additional new motor vehicle dealer or relocate an existing new motor vehicle dealer before giving notice as required in division (A) of this section or before the holding of a hearing on

any protest filed under this section, and no franchisor shall establish or relocate such a dealership after the hearing if the board determines that there is good cause for not permitting the new motor vehicle dealer to be established or relocated.

(C) Division (A) of this section does not apply to the relocation of an existing new motor vehicle dealer within one mile from the existing location or to the sale or transfer of an existing new motor vehicle dealer where the transferee proposes to engage in business at the same location.

Section 4517.54. Notice of franchisor's intent to terminate, discontinue or not renew a franchise; protest.

(A) Notwithstanding the terms, provisions, or conditions of an existing franchise, no franchisor shall terminate or fail to continue or renew a franchise except for good cause. This section governs any action or intent to terminate, discontinue, or not renew a franchise whether the franchise was entered into prior to or after the effective date of this amendment.

(B) Each franchisor proposing to terminate, discontinue, or not renew a franchise shall send written notice by certified mail of the proposed action to the franchisee at such time as may be necessary to ensure that the notice is received no later than ninety days before the effective

date of the proposed action, or no later than fifteen days before the effective date of the proposed action. . .

(C) Prior to the effective date of the proposed action, a franchisee receiving written notice from a franchisor proposing to terminate, discontinue, or not renew a franchise may file a protest with the board against the franchisor's proposed action. When such a protest has been filed, the board shall inform the franchisor that a timely protest has been filed and that a hearing is required pursuant to section 4517.57 of the Revised Code.

(D) A franchisor shall not terminate, discontinue, or fail to renew a franchise before the holding of a hearing on any protest filed under this section, or after the hearing, if the board determines that good cause does not exist to terminate, discontinue or not renew the franchise.

Ohio Constitution:

Section 28. Retroactive laws.

The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligations of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of the parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of

their want of conformity with the laws of the state.

STATEMENT OF THE CASE

A. Introduction

This case involves two cases consolidated before the District Court, both of which involved an attempt by Chrysler Corporation ("Chrysler"), to terminate the franchise of one of its dealers, Men-Guer Chrysler Plymouth, Inc. ("Men-Guer"), which had been a franchisee since 1964 when the original franchise agreement was executed by the parties. In 1980, Ohio enacted the "Dealers Act", Ohio Revised Code §§ 4517.50, *et seq.* Under Ohio Revised Code § 4517.54, Chrysler must provide notice and have good cause before it may lawfully terminate a motor vehicle dealer franchise agreement. In addition, pursuant to Revised Code § 4517.50, Chrysler must give notice and have good cause whenever it seeks to relocate another dealership into the same relevant market area of an existing dealer.

Prior to the 1980 enactment of Ohio's Dealers Act, whenever a franchisor sought to terminate a franchise, the franchisee's remedy would have been to file suit under the federal "Dealers' Day in Court Act", 15 U.S.C. § 1221, *et seq.*

In 1985, Chrysler informed Men-Guer that it planned to terminate its franchise. Pursuant to Ohio Revised Code § 4517.54, as it existed in 1985, Men-Guer filed suit in state court to enjoin the termination; this action was removed to federal court. The parties settled the 1985 action by way of a Settlement Agreement signed August 26, 1986. In 1987, Ohio amended the Dealers Act, expressly providing that the provisions requiring notice and a good cause hearing prior to termination were retroactive ("whether the franchise was entered into prior to or after the effective date of this

amendment.") In December, 1990, Chrysler and Men-Guer agreed to extend their agreements until December 31, 1991. In January, 1992, the parties executed a second extension, extending the franchise agreements until December 31, 1993, "*OR* until Market Motor Company, presently located in Canfield, Ohio, relocates to the Boardman, Ohio area, whichever happens first."

On February 12, 1992, Chrysler informed Men-Guer that Market Motors would be purchased by Greenwood and would commence business "dba Greenwood Chrysler-Plymouth as a Chrysler-Plymouth dealer in Boardman, Ohio." Chrysler also informed Men-Guer: "Details on how you should wrap up your affairs will be forwarded." There is no dispute that Chrysler seeks to discontinue its legal relationship with Men-Guer as one of its dealerships.

In response to Chrysler's stated intent to terminate Men-Guer, Men-Guer filed a protest with the Ohio Motor Vehicle Dealers Board, pursuant to Ohio Revised Code § 4517.54. Chrysler threatened to sue Men-Guer if Men-Guer did not dismiss its protest action before the Ohio Motor Vehicle Dealers Board.

B. The State Court Case

In response to Chrysler's threat, Men-Guer filed suit in state court, seeking, *inter alia*, an injunction to prevent Chrysler from enforcing the Settlement Agreement. This case was removed by Chrysler to federal district court.

C. The District Court Cases

Chrysler filed an action in 1992 to summarily enforce the Settlement Agreement entered into in 1986. Chrysler also moved to re-open the 1985 action for that same purpose. The District Court denied Chrysler's motion for Rule 60(b) relief from the order

for purposes of seeking enforcement of the Settlement Agreement, denied Chrysler's motions to summarily enforce the Settlement Agreement and granted Men-Guer's motion to dismiss Chrysler's 1992 action to enforce the Settlement Agreement.

The District Court found that the Ohio Dealers Act applied and that, therefore, the disputes between the parties should be resolved in the action then still pending before the Ohio Motor Vehicle Dealers Board.

D. The Sixth Circuit Appeal

Chrysler appealed the decision of the District Court, arguing, *inter alia*, that the District Court's application of the Ohio Dealers Act was an unconstitutional and impermissible retroactive application of Ohio law. The Sixth Circuit Court of Appeals agreed with Chrysler, finding Ohio Revised Code § 4517.54 affects substantive, vested rights in so far as it prohibits a franchisor from terminating a franchise without good cause. The Court of Appeals also found Ohio Revised Code § 4517.50, which prohibits franchisors from relocating same line-make dealerships within an existing dealer's relevant market area, cannot be applied retroactively.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit opinion in this case should be reviewed on a writ of certiorari by this Court because the opinion has far-reaching detrimental effects not only on Ohio's Dealers Act, but also upon similar remedial laws enacted in almost all of the states in the United States. In striking down Ohio's Dealers Act, the Court of Appeals went directly against the express wishes of the Ohio Legislature. In 1987, the Ohio Legislature amended the Ohio Dealers Act and expressly provided for the retroactive application of many of the sections of the Dealers Act. The reasons were

obvious. The Dealers Act was originally effective in 1980, and since many of the existing franchise agreements dated as far back as the 1950's and 1960's, the franchisors were effectively avoiding the application of the Dealers Act by arguing that the statute could not be applied retroactively. In 1987, the Ohio Legislature responded by specifically making all franchise agreements, then existing in the State of Ohio, subject to the provisions of Ohio's Dealers Act.

On the basis of a single Ohio Court of Appeals opinion rendered in 1981, the United States Court of Appeals determined the Ohio Dealers Act, Ohio Revised Code § 4517.54, affects substantive, vested rights. The case relied upon by the United States Court of Appeals was *Coulter Pontiac, Inc. v. Pontiac Motor Div.*, 4 Ohio App. 3d 169, 446 N.E. 2d 1128 (1981). This case found that Ohio Revised Code § 4517.54 cannot have retroactive application. In 1987, the Ohio Legislature responded by making Ohio Revised Code § 4517.54 explicitly retroactive:

> This section governs any action or intent to terminate, discontinue, or not renew a franchise whether the franchise was entered into prior to or after the effective date of this amendment.

Thus, *Coulter* is no longer good law in Ohio. Other Ohio courts have found the Ohio Dealers Act, Ohio Revised Code Chapter 10-4517, to be a remedial statute:

> The term "remedial statute" is applied to Acts relating to the remedy as distinguished from those relating to substantive rights. The Supreme Court of Ohio has acknowledged that it is doubtful if a perfect definition of remedial law could be devised. *State, ex rel., Holdridge*

> *v. Indus. Comm.* (1967), 11 Ohio St. 2d 175 [40 O.O. 2d 162]. However, most courts agree that remedial law prescribes methods of enforcement of rights or of obtaining redress. *Id.* Thus, R.C. Chapter 4517, which sets forth remedies and means of recovery for franchisees who have been mistreated by their franchisors . . . is remedial and is therefore to be liberally construed to promote said remedies and means.

Car Business v. Fleetwood Motor Homes, 23 Ohio Misc. 2d 40, 42 (Clermont Cty. Ct. of Com. Pls. 1985).

In addition, prior to the 1980 enactment of Ohio's Dealers Act, Ohio car dealers' substantive rights were protected by common law and by the federal Dealers' Day in Court Act, Title 15, U.S. Code § 1221, *et seq.*, which, like the Ohio Dealers Act, requires the franchisor to act in "good faith" in performing or complying with the franchise provisions or in curtailing the franchise with the dealer. Thus, the 1980 enactment of Ohio's Dealers Act set forth remedies and means mistreated by their franchisors.

In addition to striking down Ohio's law based upon an incorrect interpretation of Ohio law, the United States Court of Appeals also unnecessarily determined that the District Court's decision required a retroactive application of the Dealers Act. This was the basis for Men-Guer's Petitioner for Rehearing in which Men-Guer argued the Court of Appeals mistakenly believed that Chrysler, in the District Court, sought to enforce its rights under the 1964 franchise agreement. In fact, Chrysler sought to enforce no rights under the 1964 agreement. Rather, Chrysler sought to enforce only those rights it allegedly obtained under the 1986 Settlement Agreement and the two subsequent amendments to the Settlement Agreement, all of which were executed after the 1980

enactment of Ohio's Dealers Act. Since Chrysler sought to enforce only those rights it obtained subsequent to 1980, it was not necessary for the United States Court of Appeals to determine that there was an unconstitutional retroactive application of the Dealers Act. It was, therefore, not necessary for the Court of Appeals to reach the constitutional issues.

This is a matter of grave concern to not only all Ohio dealers whose franchise agreements were signed prior to the 1980 Dealers Act, but it is also a matter of grave concern to dealers in almost all of the states in the United States because all of these states also have remedial laws very similar to Ohio's Dealers Act. The powerful Detroit manufacturers are now taking advantage of the Sixth Circuit Court of Appeals' opinion; they are arguing, in protest actions before the Ohio Motor Vehicle Dealers Board, that the Ohio Dealers Act does not apply to those dealers who signed their agreements prior to 1980; and they claim that these dealers, therefore, may not access the protest procedures set up by the Ohio Legislature to take place before the Ohio Motor Vehicle Dealers Board. No doubt, these same arguments are being heard across the United States. Dealers who once thought they had access to these special statutory proceedings are now finding that their remedy lies back in the common law and under the federal Dealers' Day in Court Act.

Thus, the dealers and the public are being deprived of the benefits of the specialized expertise which has developed before the Ohio Motor Vehicle Dealers Board and similar boards in other states, pursuant to the Ohio Dealers Act and similar remedial laws in other states. This is a tremendous waste of legislative effort and the efforts which have developed over the life of the Dealers Act to resolve disputes between car dealers and manufacturers in a specialized proceeding in a forum specifically designed to resolve such disputes in an expeditious manner by individuals who have developed expertise in applying the remedies set forth in the Dealers Act.

The opinion of the Court of Appeals has created havoc out of the Ohio's special administrative protest proceedings.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Writ of Certiorari.

Respectfully submitted,

ROBERT C. PAXTON II
Counsel of Record
PATRICIA A. JAMISON
Attorneys for Petitioner
88 East Broad Street, Suite 1590
Columbus, Ohio 43215
(614) 221-3006

Dated: May 11, 1994

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED FEBRUARY 11, 1994

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No: 92-3923: 92-3924

MEN-GUER CHRYSLER-PLYMOUTH, INC.

Plaintiff-Appellee

v.

CHRYSLER CORPORATION

Defendant-Appellant

BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges; and JOINER, Senior District Judge.*

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED. Judge Joiner adheres to his dissent.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green, Jr.
Leonard Green, Clerk

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* The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JANUARY 12, 1994

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 92-3923/3924

MEN-GUER CHRYSLER-PLYMOUTH, INC.,

Plaintiff-Appellee
(92-3923),
Defendant-Appellee
(92-3924),

v.

CHRYSLER CORPORATION,

Defendant-Appellant
(92-3923),
Plaintiff-Appellant
(92-3924).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges; JOINER, Senior District Judge.*

PER CURIAM. This case stems from an attempt by Chrysler

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* The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

Corporation ("Chrysler") to terminate the franchise of an Ohio automobile dealership operated by Men-Guer Chrysler-Plymouth, Inc. ("Men-Guer"). Chrysler brought this diversity suit asking that the district court enforce an earlier settlement agreement between the parties that the manufacturer alleged governed all aspects of their relationship. For the reasons outlined below, the district court declined Chrysler's invitation and instead dismissed for lack of jurisdiction. Upon review, we conclude that this dismissal was premature and therefore vacate the district court's order and remand the case for further proceedings.

I.

Chrysler first entered into two direct dealership agreements ("DDAs") with Men-Guer in 1964. These agreements contained no expiration date and the relationship between the parties continued for many years. It soured, however, in 1985 when Chrysler informed Men-Guer that, because of Men-Guer's declining sales and poor performance, Chrysler intended to terminate the DDAs.

Pursuant to state statute ("Dealers Act"), Men-Guer filed suit in the Ohio court of common pleas to challenge the proposed termination.[1] Chrysler removed the action to federal district court. The district court partially resolved the suit on April 12, 1986, when it ruled that the good cause provision of the Dealers Act did not apply retroactively.[2] *Men-Guer Chrysler-Plymouth v. Chrysler Corp.*, No. C85-3368Y (N.D. Ohio Apr. 12,1986).

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1. The Ohio legislature passed the Dealers Act in 1980. At the time that the parties first entered into their franchise agreement in 1964, no statute existed that explicitly governed the relationship between an automobile manufacturer and an authorized dealer.

2. As it existed at the time that the original dispute arose, O.R.C. § 4517.54 (Cont'd)

The parties subsequently entered into a settlement agreement ("Settlement") that resolved the remaining issues of the lawsuit. The Settlement provided for an extension of the existing DDAs so that Men-Guer could continue to operate its franchise until December 31, 1990. Until that time, Chrysler would treat the franchise like any other except that it would not attempt to terminate the dealer's DDAs for inadequate sales performance. For its part, Men-Guer agreed to waive its right to protest the establishment of an additional Chrysler-Plymouth dealership within a ten-mile radius of its business.[3]

The next several years passed uneventfully. On December 19, 1990, the parties elected to continue the DDAs for another year under the terms of the Settlement. As this extension drew to a close, Chrysler proposed extending the DDAs a second time under the following terms:

> Chrysler is again prepared to extend your Dealer Agreements [DDAs] for a period of two (2) years, until December 31, 1993, *OR* until Market Motor Company, presently located in Canfield, Ohio, relocates to the Boardman, Ohio area, whichever happens first. This further extension is given subject to all the terms and conditions of your Dealer

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(Cont'd)
provided that franchises could be terminated only for "good cause." Aggrieved dealers could seek a preliminary and permanent injunction in the court of common pleas to enforce this provision.

3. The Dealers Act includes a provision that permits dealers to challenge the establishment of a same-line dealership within a ten-mile radius of an existing franchise. Ohio Rev. Code Ann. § 4517.50 (Anderson 1993).

> Agreements and, more specifically, it is also subject in all respects to the provisions of the Settlement Agreement.

On February 12, 1992, shortly after this extension took effect, Chrysler informed Men-Guer by letter that it intended to approve Greenwood Nissan, Inc., as the Chrysler-Plymouth dealer in Boardman. Accordingly, Chrysler informed Men-Guer that it could expect to "wrap up its affairs" by the end of the month.

Men-Guer promptly protested the establishment of a competing franchise to the Ohio Motor Vehicle Dealers Board ("MVDB"), which in turn notified Chrysler that no new dealership could be established before a hearing was conducted pursuant to O.R.C. § 4517.57 (MVDB shall schedule a hearing concerning Dealers Act protests within 180 days).

Chrysler then filed suit in federal court seeking to enforce the Settlement, including liquidated damages in the amount of $1,000 for each day that Men-Guer was deemed to be in breach.[4] The company also filed a Fed. R. Civ. P. 60(b) motion seeking to vacate the dismissal order in the earlier federal court case, ostensibly so that the district court would have jurisdiction to enforce the Settlement.

Although it acknowledged that "the court that originally adjudicated the dispute always retains the 'inherent power' to enforce the terms of settlement," the district court refused to do so. It based its decision in part on amendments made to the Dealers Act

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4. For its part, Men-Guer filed suit in a state court seeking declaratory and injunctive relief. Although not relevant to this appeal, the state court determined that the MVDB was the appropriate forum.

in 1987 that made it explicitly retroactive.[5] Accordingly, the court determined that the MVDB represented the proper forum and dismissed Chrysler's action for lack of jurisdiction.

On appeal, Chrysler contends that the district court erred in retroactively applying the Dealers Act to the Settlement. First, the company asserts that nothing in the language of the statute indicates that the legislature intended that the "same-line" dealership provision have retroactive application. Second, it argues that retroactive application of the good cause requirement for termination of a franchise violates both the Ohio and United States Constitutions.

II.

We begin our inquiry by observing that we review *de novo* the district court's dismissal for lack of subject matter jurisdiction. *Willis v. Sullivan*, 931 F.2d 390, 395 (6th Cir. 1991).

As a preliminary matter, we note that this court will typically consider only arguments raised before the district court. *Singleton*

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5. The retroactivity provision reads as follows:

> Notwithstanding the terms, provisions or conditions of an existing franchise, no franchisor shall terminate or fail to continue or renew a franchise except for good cause. *This section governs any action or intent to terminate, discontinue, or not renew a franchise whether the franchise was entered into prior to or after the effective date of this amendment.*

Ohio Rev. Code Ann. § 4517.54(A) (Anderson 1993) (italics indicate language from 1987 amendment).

v. Wulff, 428 U.S. 106,120 (1976). In its Memorandum and Order dismissing this action, the lower court did not discuss the constitutional implications of applying the Dealers Act retroactively. While Chrysler did not brief its constitutional arguments below, it explicitly reserved the right to do so in a memorandum of law submitted to the district court. In light of this court's discretionary power to reach issues necessary to the proper disposition of the case, *Pinney Dock and Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1455 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988), we conclude that the issue is properly before us and therefore turn to the statutory provisions in question.

Under Ohio law, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." Ohio Rev. Code Ann. § 1.48 (Anderson 1993). While § 4517.54, as amended in 1987, clearly contemplates retroactive application, our inquiry does not end there. Section 28, Article II of the Ohio Constitution provides as follows:

> The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Ohio courts look to whether the retroactive application of a statute affects substantive or remedial rights when faced with a constitutional challenge. *Van Fossen v. Babcock & Wilcox Co.*, 36

Ohio St. 3d 100,106-07, 522 N.E.2d 489 (1988). Substantive rights are implicated when the statute "impairs or takes away vested rights; affects an accrued substantive right; [or] imposes new or additional burdens, duties, obligations or liabilities as to a past transaction." *Id.* at 107 (citations omitted). On the other hand, "[a] statute purely remedial in its operation on pre-existing rights, obligations, duties and interests, is not within the mischiefs against which [Section 28, Article II] . . . was intended to guard." *Id.* (citing *Rairden v. Holden,* 15 Ohio St. 207 (1864)).

Because the Ohio Supreme Court has yet to rule on the retroactivity of the Dealers Act, we turn to the intermediate state courts of appeal for guidance. *Commissioner of Internal Revenue v. Estate of Bosch,* 387 U.S. 456, 465 (1967). At least one such court has explicitly found that § 4517.54 implicates substantive rights:

> The provisions at issue are intended to add the substantive requirement in franchise contracts, covered by the [Dealers] Act, that grounds for termination be limited to those specific reasons set forth by statute. That the statutes are substantive is reflected in the decisions in Ohio and elsewhere.

Coulter Pontiac, Inc. v. Pontiac Motor Div., 4 Ohio App. 3d 169, 171, 446 N.E.2d 1128 (1981). We likewise conclude that § 4517.54 affects substantive, vested rights insofar as it prohibits a manufacturer from terminating a franchise without good cause.

In the case before us, the Settlement between the parties clearly contemplated an extension of the DDAs of 1964:

Appendix B

> During the time between the execution of this Stipulation and December 31, 1990, the parties agree that Men-Guer shall be treated in the same manner by Chrysler as all other Chrysler motor vehicle dealers, except that Chrysler shall not attempt to terminate the Agreements [DDAs] for the continued failure of Men-Guer to attain its Minimum Sales Responsibility, and that their relationship in all other respects shall be governed by the terms and conditions of the Agreements and all amendments to them.

Similarly, the two subsequent extensions of this Settlement unequivocally extend the original agreements made between the parties.

The statutory provision requiring "good cause" for termination was enacted in 1980, long after the DDAs at issue were finalized. Thus, retroactive application of § 4517.54 would undeniably burden a substantive right negotiated for by Chrysler and would violate Section 28, Article II of the Ohio Constitution.[6]

We turn next to Men-Guer's invocation of the "same-line" dealership prohibition contained in § 4517.50 to halt the establishment of a second Chrysler-Plymouth dealership within its market area. Chrysler argues that the MVDB lacked authority to entertain the dealership's appeal because, like the termination provision, § 4517.50 cannot be applied retroactively.

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6. Chrysler also contends that application of the Dealers Act to the Settlement violates the Contract Clauses of both the United States and Ohio Constitutions. Because we resolve this matter on other grounds, we do not reach this issue.

In our view, the plain language of § 4517.50 supports this contention. As noted earlier, Ohio statutes are presumed to be prospective. Ohio Rev. Code Ann. § 1.48 (Anderson 1993). The provision at issue contains no language that indicates that the Ohio legislature intended retroactive application. Moreover, the 1987 amendment to the termination provision of the Dealers Act did not affect § 4571.50. Under the circumstances, we can only conclude that the MVDB lacked authority to entertain Men-Guer's protest of a "same-line" dealership within its market area.

In sum, the district court's resolution of this controversy based upon a retroactive application of the Dealers Act was misplaced. Accordingly, its dismissal of Chrysler's claim was premature and its conclusion that the MVDB represented the proper forum for this dispute was erroneous.

Finally, on appeal Men-Guer levels challenges against the Settlement itself. Among other things, the dealership maintains that the Settlement expired, that any extension was obtained through coercion, and that it was modified by verbal understandings. The district court did not consider the merits of these contentions before dismissing this action, and this court is not in a position to undertake the fact-finding necessary to resolve them.

III.

For the foregoing reasons, the order of the district court dismissing this action is reversed and the matter is remanded for further proceedings consistent with this opinion.

Appendix B

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By
Deputy Clerk

ISSUED AS MANDATE: February 22, 1994
COSTS: (Awarded to appellant)

FILING FEE	$ None
PRINTING	$ 941.50
TOTAL	$ 941.50

Appendix B

Men-Guer Chrysler-Plymouth, Inc. v. Chrysler Corporation, Nos. 92-3923; 92-3924

Charles W. Joiner, Senior District Judge, dissenting. In 1980, the State of Ohio enacted the Motor Vehicle Dealers Act, the purpose of which was succinctly stated in *In re Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.*, 1992 Ohio App. LEXIS 4883, at *5 (Sept. 24, 1992):

> The general history of this type of legislation is well documented. Against a backdrop of abusive and unfair franchise practices by the powerful automobile manufacturing industry, the federal government and many states enacted motor vehicle franchise legislation to protect motor vehicle dealers from such abuses and essentially change the balance of economic power between these enterprises. In addition to passing restrictions on the bad faith termination of franchises, many states also enacted legislation which prevents the oversaturation of a franchisee's market area with additional or relocated dealerships of the same brand. Most of these statutes, like Ohio's R.C. 4517.51, plainly restrict the freedom of the manufacturer to place an interbrand competitor within a specified proximity of an existing dealer unless there is "good cause" to do so. Consequently, today the discretion of an administrative agency serves as a check upon the power of the automobile manufacturer to dictate the terms of the franchise relation.

Appendix B

(Citations omitted.)

Men-Guer and Chrysler entered into their original franchise agreement in 1964, and I agree with the majority that the 1980 Motor Vehicle Dealers Act cannot be applied retroactively *to that agreement.* However, subsequent to the enactment of the 1980 Act, the parties chose to modify their existing agreement through execution of the 1986 settlement agreement and the 1990 and 1992 extensions thereof. In light of the strong public policy underlying the Motor Vehicle Dealers Act, I would hold that the 1986 settlement agreement and each of the subsequent extensions of that agreement constitute new franchise agreements, independently subject to the provisions of the 1980 Act.

When parties to an franchise elect to tinker with their agreement in a substantial way, and there is no question but that they did in this case[1], they do so at the peril of creating a new agreement that must be subject to the provisions of the Act. The Act's application to such modifications is not "retroactive," and poses no problem of state or federal Constitutional law. Moreover, in keeping with Ohio's decision to interpose the authority of an administrative agency to oversee the performance of franchise agreements, I cannot agree with the majority's implicit conclusion that a franchise agreement remains impervious to the provisions of the 1980 Act through indefinite "extensions" of those agreements, even when entered into after 1980.

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1. Included in the modifications was Chrysler's express agreement in 1992 to continue Men-Guer's franchise until the occurrence of one of two possible events: the relocation of a specific, named dealer to Men-Guer's area, or the expiration of two years, whichever occurred earlier. Neither event occurred prior to Chrysler's exercise of its claimed right to terminate the franchise just three weeks after entering into this agreement.

Appendix B

The district court correctly held that the parties' settlement agreement and the extensions of that agreement constituted franchise agreements independently subject to the 1980 Motor Vehicle Dealers Act. I would affirm on that basis. Thus, I respectfully dissent.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, FILED AUGUST 11, 1992.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C85-3368Y

MEN-GUER CHRYSLER PLYMOUTH, INC.,

Plaintiff,

vs.

CHRYSLER CORPORATION,

Defendant.

Case No. 4:92CV0478

CHRYSLER CORPORATION,

Plaintiff,

vs.

MEN-GUER CHRYSLER-PLYMOUTH, INC.

Defendant.

MEMORANDUM AND ORDER

Appendix C

ALDRICH, J.

Chrysler Corporation brings this action against Men-Guer Chrysler-Plymouth to summarily enforce a settlement agreement entered into in 1986. It has also moved to reopen the 1985 action for that same purpose. Men-Guer, in turn, has opposed these motions and moved to dismiss the 1992 action for lack of subject matter jurisdiction. For the reasons stated, the motion to reopen and the motion to summarily enforce the settlement agreement are denied, and the motion to dismiss is granted.

I.

Both of these actions, 92-CV-0478 ("the 1992 action") and C85-3368Y ("the 1985 action"), involve an attempt by the Chrysler Corporation to terminate the franchise of one its dealerships, Men-Guer Chrysler-Plymouth, Inc. ("Men-Guer"). Men-Guer has been a Chrysler-Plymouth dealer in Boardman, Ohio since 1964. At the time the franchise agrement was originally executed, Chrysler had the right to terminate the franchse at-will. However, in 1980, the Ohio legislature revised the applicable statutes. Under O.R.C. §4517.54, as amended, Chrysler must now provide notice and have good cause before it may lawfully terminate, discontinue, or fail to renew a motor vehicle dealer franchise agreement. In addition, pursuant to O.R.C. §4517.50, as amended, Chrysler must now provide notice and have good cause whenever it seeks to establish a new dealership or relocate another dealership in the same relevant market area.

Prior to 1987, if an automobile dealership wanted to enforce its rights and enjoin a manufacturer from terminating its franchise or establishing a competing franchise or establishing a competing franchise in the area, it was required to file suit for injunctive relief

in a county court of common pleas. Effective October 22, 1987, however, a franchisee may now file a protest with the Ohio Motor Vehicle Dealers Board ("OMVBD"). O.R.C. §§4517.50(A); 4517.54(C). When such a protest is filed, the proposed actions are automatically stayed pending a hearing on the issue within one-hundred and eighty (180) days. O.R.C. §4517.57(A).

This dispute was initially commenced in 1985 when Chrysler informed Men-Guer that it planned to terminate its franchise for low sales performance. Pursuant to O.R.C. § 5417.54, as it existed in 1985, Men-Guer filed suit in state court to enjoin the planned termination for a lack of good cause. The case was then removed to federal court based on diversity of citizenship. On April 12, 1986, this Court dismissed Count I of the complaint on the grounds that the good cause requirement imposed by O.R.C. §5417 was not retroactively applicable to a franchise agreement entered into on January 14, 1964. *Men-Guer Chrysler-Plymouth v. Chrysler Corporation*, No. C85-3368Y, slip op. (N.D. Ohio, Apr. 12, 1986) (following *Coulter Pontiac Inc. v. Pontiac Motor Division*, 446 N.E. 1128 (Ohio App. 1981)).[1]

Following this ruling, the parties settled their dispute and filed a stipulation of dismissal, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure. Under the written settlement agreement executed on May 26, 1986, Men-Guer agreed to "voluntarily terminate . . . its agreements with Chrysler" on or

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1. This holding was subsequently reversed by the Ohio state legislature on October 22, 1987. O.R.C. §4517.54(A) now provides:

> This section governs any action or intent to terminate, discontinue, or not renew a franchise whether the franchise was entered into prior to or after the effective date of this amendment.

before December 31, 1990. Until that time, Chrysler agreed to treat Men-Guer in the same manner as all other dealers and not attempt to terminate the franchise for a failure to attain minimum sales standards. Men-Guer agreed, however, to "waive its rights, if any, under Ohio Revised Code Section 4517.50 to protest the establishment of an additional Chrysler-Plymouth dealership" in the relevant market area.

In the event of a substantial breach, the agreement provided for the following relief:

> The breaching party will pay as liquidated damages one thousand dollars ($1,000) for each day that the party is in breach of any of the provisions of this stipulation; provided, however, that this provision with respect to liquidated damages is intended to be, and shall be, cumulative, and shall be in addition to every other remedy now and hereafter existing at law or equity, or by statute, except those remedies which Men-Guer herein agrees to waive, and shall not in anyway interfere with any right of either party to enjoin or restrain the other from any violation of this Stipulation.

In addition, the agreement provided for the payment of attorneys' fees and costs.

The settlement agreement also provided for possible extensions of the date for termination. "Upon the request of Men-Guer," the agreement provided, "Chrysler, in its sole discretion, may determine to continue or not continue the Agreements beyond December 31, 1990." Pursuant to this provision, Chrysler granted

Men-Guer two (2) extensions. First, Chrysler granted an extension until December 31, 1991, and then granted another extension until December 31, 1993. In granting the second request for an extension, Chrysler stated:

> In its first extension of the termination of your Dealership Agreements until December 31, 1991, Chrysler reserved all of its rights under the Settlement Agreement, including the right to terminate, for any reason, the Dealer Agreements after December 31, 1991.
>
> Chrysler is again prepared to extend your dealer agreements for a period of two (2) years, until December 31, 1993, *OR* until Market Motor Company, presently located in Canfield, Ohio, relocates to the Boardman, Ohio area, whichever happens first.

Men-Guer agreed to this qualification and the extension went into effect.

Following this agreement to grant an extension, Chrysler learned that on December 20, 1991, Wayne Greenwood, the majority owner of Greenwood Nissan, Inc., had entered into an agreement with Jack Ritter, the majority owner of Market Motor, Inc., to purchase substantially all of the assets and inventory of Market Motor for use at his dealership in Boardman, Ohio. On February 12, 1992, Chrysler wrote Men-Guer to provide formal notice that it planned to approve the Market Motors/Greenwood Nissan buy-sell agreement by "mid to late March." The letter went on to add, "Details on how you should wrap up your affairs will be forwarded to your attention at that time."

Upon receipt of this letter, Men-Guer promptly sent a letter to the Ohio Motor Vehicle Dealers Board in Columbus, Ohio to protest the establishment of a competing franchise within its relevant market area and the termination of its franchise. On February 24, 1992, OMVDB notified Chrysler that it would not permit the proposed establishment of a dealership until a hearing could be held on the issue. Chrysler then wrote Men-Guer to advise that it planned to file an independent action in federal court to enforce the settlement agreement if Men-Guer did not dismiss its protest with prejudice immediately.

In response, Men-Guer filed a lawsuit of its own in the Franklin County Court of Common Pleas, seeking the following relief:

> (1) a declaratory judgment that Chrysler had violated O.R.C. §4517;
>
> (2) a declaratory judgment that the settlement agreement is null and void; and
>
> (3) an injunction to prevent Chrysler from enforcing the settlement agreement.

A hearing on a motion for a temporary restraining order was then scheduled for March 10, 1992 at 9:00 a.m. before the Honorable Guy L. Reece II.

Before that TRO hearing could be held, however, Chrysler filed an action in federal court, case no. 92-CV-0478 (the "1992 action"), to summarily enforce the settlement agreement. The complaint sought both injunctive relief to order Men-Guer to dismiss its protest and terminate its franchise and monetary

damages caused by the alleged breach. A hearing on the motion for a temporary restraining order was then scheduled for March 10, 1992 at 5:00 p.m.

With two TRO hearings in two different cities and two different courts, March 10, 1992 was a busy day for these parties. In the morning, Judge Reece heard the parties and issued the following ruling:

> After careful consideration of the arguments presented by counsel for the parties, the Court finds the appropriate forum for the various disputes currently between the parties, including the validity and enforceability of the Settlement Agreement and its extensions, is the Ohio Motor Vehicle Dealers Board. . . . The Court, therefore, ORDERS the currently pending protest matters to proceed in accordance with R.C. Chapter 5417 before the Ohio Motor Vehicle Dealers Board.

Men-Guer Chrysler-Plymouth. Inc. v. Ohio Motor Vehicles Dealers Board, Case No. 92CVH03-1825, slip op. at 1-2 (Ohio Ct. Comm. Pleas, Mar. 10, 1992). Judge Reece refused, however, to enjoin the federal action pending in this Court.

Later that day, the parties appeared before this Court for the other TRO hearing. After receiving a briefing on the hearing before Judge Reece, this Court refused to summarily enforce the settlement agreement at that time due to a lack of jurisdiction. Following *Hinsdale v. Farmers National Bank,* 823 F.2d 993, 995 (6th Cir. 1987), this Court held, "[B]ecause the prior unconditional dismissal was not vacated nor the proceedings reopened, [this

Court does not have] jurisdiction to enforce the settlement agreement." *Chrysler Corporation v. Men-Guer Chrysler-Plymouth*, No. 92-CV-0478, transcript at 12 (N.D. Ohio, Mar. 10, 1992). At the close of the hearing, the Court ordered both parties to brief all jurisdictional issues.

On April 3, 1992, Chrysler filed a Rule 60(b) motion in the 1985 action for relief from the dismissal order for the purpose of enforcing the settlement agreement. Men-Guer opposed this motion and moved to dismiss the 1992 action for lack of jurisdiction. By June 17, 1992, the parties had filed ten (10) memorandum on this issue. Chrysler then filed another motion "to summarily enforce the settlement agreement" and the parties filed even more briefs and exhibits on these issues.

II.

Whenever parties terminate a civil action by entering into a settlement agreement, the court, that originally adjudicated the dispute always retains the "inherent power" to enforce the terms of settlement. *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976) ("[A] compromise in settlement of litigation is *always* referable to the action or proceeding in the court where the compromise was effective.") However, where the original action was dismissed with prejudice pursuant to Rule 41(b)(1)(ii), the court may not take *summary* action to enforce the settlement agreement until the prior dismissal order has been vacated. *Hinsdale v. Farmers National Bank*, 823 F.2d 993, 996 (6th Cir. 1987).[2] Once the dismissal order has been vacated and the

2. Chrysler may also seek enforcement of the agreement by filing an independent action for specific performance. *Hinsdale*, 823 F.2d at 996. However, this Court cannot take any *summary* action to enforce that agreement in that action without a showing of irreparable harm pursuant to Rule 65(a).

proceedings reopened, then the court has "the power to summarily enforce the settlement agreement, [although] factual hearings should be held when a substantial factual dispute exists." *Aro Corp.*, 531 F.2d at 1372.

In accordance with this holding, Chrysler has moved for relief from the order dismissing the 1985 action so that it may obtain summary enforcement of the settlement agreement. The filing of this motion does not automatically warrant summary enforcement of the settlement agreement, however. This Court may, "in its proper discretion under Rule 60(b)(6)," refuse to vacate the dismissal order in light of "equitable and policy considerations" to the contrary. *Shelter-Lite v. Reeves Bros.*, 611 F.2d 1179, 1180 (6th Cir. 1980); *Aro Corp.*, 531 F.2d at 1372 ("settlement agreements should be enforced whenever equitable and policy considerations so permit.")

In this case, there are strong equitable and policy reasons to deny the motion to vacate the dismissal order and reopen these proceedings. Under Ohio law, the legal relationships between motor vehicle manufacturers and motor vehicle dealers are highly regulated by the state. All aspects of the relationship from establishment of a franchise to relocation and termination are regulated by the state. O.R.C. §4517.59, for example, establishes fourteen (14) different actions that a manufacturer may not lawfully take against a dealer. These duties exist "not withstanding the terms, provisions, or conditions of any agreement, franchise, or waiver." *Id.*

As prevlously discussed, one of these duties is the duty not to "terminate, fail to continue, or fail to renew a franchise except for good cause." O.R.C. §4517.54(A). A "franchise" is more than just an agreement to establish and operate a motor vehicle dealership. It

includes "*any* written agreement, contract, or understanding" between a manufacturer and a dealer "which purports to fix the legal rights and liabilities of the parties." O.R.C. §4517.01(V) (emphasis added). Based on this broad definition, the settlement agreement and the two extensions are all "franchise" under Ohio law because they all "fix the legal rights and liabilities of the parties."

Chrysler asserts that since the settlement agreement provides that Men-Guer will "voluntarily terminate" its franchise at the close of the prescribed period, its request that Men-Guer adhere to this promise does not all within the scope of O.R.C. §4517.54. However, as O.R.C. §4517.54(A) provides, the good cause requirement applies to all franchise agreements, including settlement agreements, "*notwithstanding* the terms, provisions, or conditions" that state otherwise. (emphasis added). There is no dispute that Chrysler wants to discontinue its legal relationship with Men-Guer as one of its dealerships. *See* O.R.C. §4517.54(A) ("This section governs any action or *intent* to terminate . . . a franchise.") Consequently, it must have good cause for this action notwithstanding the provisions contained in the settlement agreement that characterize this discontinuance as a voluntary termination of the franchise by Men-Guer.

The fact that this result obliterates the terms of a settlement agreement that both parties have mutually abided by for the past six (6) years does not change this result. As previously discussed, O.R.C. §4517.54 applies to any "existing franchise," including settlement agreements, "whether [it] was entered into prior to or after the effective date of this amendment." O.R.C. §4517.54(A). Retroactive application of a new statute will often alter legal relationships and agreements based on previously existing laws. However, this retroactive alteration of existing agreements was clearly the mandate of O.R.C. §4517.54(A).

Appendix C

Prior to 1987, Ohio law provided the courts of common pleas the jurisdiction to determine whether good cause exists to terminate or discontinue a franchise. Now, however, O.R.C. §4517 provides the Ohio Motor Vehicle Dealers Board exclusive jurisdiction over this issue. *See* O.R.C. §4517.55(A) ("In determining whether good cause exists . . . the *motor vehicle dealers board* shall take into consideration . . .") (emphasis added); O.R.C. §4517.54(D) (The franchisor may not take any action to terminate the franchise "before the holding of the hearing, . . . or after the hearing, if *the board* determines that good cause does not exist.") (emphasis added). The courts of common pleas can only obtain jurisdiction over the matter if one of the parties appeals the board's decision pursuant to O.R.C. §119.12. *See e.g. Kiss v. Ohio Motor Vehicle Dealers Board*, No. 59358, 1991 WL 232307 (Ohio App., Cuyahoga Cty., Nov. 7, 1991); *Slavin Ford Inc. v. Ford Motor Co.*, No. 91AP-354, 1991 WL 151252 (Ohio App., Franklin Cty., Aug. 1, 1991).

Even though there exists diversity of citizenship in this case, this Court does not have concurrent jurisdiction together with the Ohio Motor Vehicle Dealers Board to determine whether there is "good cause" to discontinue Men-Guer's franchise. As one other district court has held, an out-of-state manuacturer may not remove a case pending before the OMVDB based on diversity of citizenship. *Ford Motor Co. v. McCullion*, No. C2-88-142, No. C2-87-1459, 1989 WL 267215, *2-3 (S.D. Ohio, Apr. 14, 1989). Otherwise, the whole state administrative scheme for the regulation of motor vehicle dealerships would be destroyed. *Id.* at *3 ("Here, the state has a substantial interest in preserving the validity of its administrative structure as a whole.")

In addition, an out-of-state manufacturer may not circumvent the state regulatory scheme by bringing an independent action in federal court. The OMVDB has an extensive amount of experience

and expertise in determining when "good cause" exists for the termination of a franchise under O.R.C. §4517.55. In such instances, the courts have routinely required the parties to exhaust administrative remedies prior to seeking judicial relief. *See e.g. Ray Slavin Ford,* 1991 NL 267215, at *4-5. As the Supreme Court has held:

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity . . . to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

Weinberger v. Salfi, 422 U.S. 749, 765 (1975). By requiring an exhaustion of administrative remedies in this case, this Court ensures that it does not unduly interfere with the state regulatory scheme in an area where there is, a strong state interest and an "obvious lack of any federal interest in the dispute." *Ray Slavin Ford, Inc.*, 1989 WL 267215, at *3.

III.

Therefore, the Court now enters the following orders:

(1) The motion for relief from the order for purpose of seeking enforcement of settlement agreement that was filed in case no. C85-3168Y is denied;

(2) The motion to summarily enforce settlement agreement that was filed in case nos. 92-CV-0478 and C85-3368Y is denied;

(3) The motion to dismiss the complaint filed in case no. 92-CV-0478 is granted;

(4) The supplemental motion to dismiss the complaint based on the deposition testimony of James Davis is denied as moot, and

(5) the motion for sanctions is denied.

IT IS SO ORDERED.

s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C85-3368Y

MEN-GUER CHRYSLER PLYMOUTH, INC.,

Plaintiff,

vs.

CHRYSLER CORPORATION,

Defendant.

Case No. 4:92CV0478

CHRYSLER CORPORATION,

Plaintiff,

vs.

MEN-GUER CHRYSLER-PLYMOUTH, INC.

Defendant.

ORDER

The Court has now filed its memorandum and order; therefore,

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IT IS ORDERED that:

(1) The motion for relief from the order for purpose of seeking enforcement of settlement agreement that was filed in case no. C85-3368Y is denied;

(2) The motion to summarily enforce settlement agreement that was filed in case nos. 92-CV-0478 and C85-3368Y is denied;

(3) The motion to dismiss the complaint filed in case no. 92-CV-0478 is granted;

(4) The supplemental motion to dismiss the complaint based on the deposition testimony of James Davis is denied as moot, and

(5) the motion for sanctions is denied.

IT IS FURTHER ORDERED that case no. 92-CV-9478 is dismissed in its entirety, without prejudice.

s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE